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IN THE

Supreme Court of the United States

October Term, 1963

No. 30

EDWARD R. FIELDS and NATIONAL STATES RIGHTS PARTY, and ROBERT LYONS,
Appellants,

v.

CITY OF FAIRFIELD,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

BRIEF FOR APPELLANTS

MELVIN L. WULF,
156 Fifth Avenue,
New York 10, N. Y.,

CHARLES MORGAN, JR.,
Bank for Savings Building,
Birmingham, Alabama,

LEON FRIEDMAN,
RICHARD J. MEDALIE,
425 Park Avenue,
New York, N. Y.,

Attorneys for Appellants

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IN THE

Supreme Court of the United States

October Term, 1963

No. 30

EDWARD R. FIELDS and NATIONAL STATES RIGHTS PARTY and ROBERT LYONS,

Appellants,

against

CITY OF FAIRFIELD,

Appellee.

BRIEF FOR APPELLANTS

Opinions Below

The opinion of the Supreme Court of Alabama affirming appellants' convictions is reported at—Ala.—, 143 So. 2d 177 and is contained in the Record at pp. 86-90. No opinion was written by the Circuit Court of Jefferson County, but its oral opinion rendered at the time of conviction is contained in the Record at pp. 71-73.

Jurisdiction

Appellants Fields and Lyons were adjudged guilty of criminal contempt on October 12, 1961. The judgment was affirmed and entered by the Alabama Supreme Court on June 14, 1962 (R. 91) and a timely application for rehearing denied on July 12, 1962 (R. 93). Notice of Appeal to the Supreme Court of the United States was filed with the Supreme Court of Alabama on September 10, 1962 (R. 95-97).

and an amendment to the Notice was filed September 18, 1962 (R. 98-99). Execution of sentence was stayed by the Alabama Supreme Court until final disposition by this Court (R. 93-94). Probable jurisdiction was noted on March 18, 1963 (R. 99).

Jurisdiction of this Court rests on 28 U. S. C. § 1257(2).

Constitutional Provisions Involved

UNITED STATES CONSTITUTION

Amendment 1:

> "Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances."

Amendment 14, Section 1:

> "* * * No State shall * * * deprive any person of life, liberty or property, without due process of law."

The Statutes Involved

GENERAL CITY CODE OF FAIRFIELD, ALABAMA

Sec. 3-4. Handbills, etc.—Distribution on streets.

It shall be unlawful for any person to distribute or cause to be distributed on any of the streets, avenues, alleys, parks or any vacant property within the city any paper handbills, circulars, dodgers or other advertising matter. [Ord. No. 354, § 4 (1957).]

Sec. 3-5. Same—Placing or throwing in automobiles.

It shall be unlawful for any person to distribute in the city any handbill or other similar form of advertising by throwing or placing the same in any automobile or other vehicle within the city. [Ord. No. 354, § 5 (1957).]

Sec. 14-53. Public meetings; permit required.

It shall be unlawful for any person or persons to hold a public meeting in the city or its police jurisdiction without first having obtained a permit from the mayor, to do so. [Ord. No. 184, § 4, 11-9-32.]

Questions Presented

1. Whether Sections 3-4 and 3-5 of the General City Code of Fairfield, Alabama, upon which appellants' contempt convictions rest, on their face or as construed and applied in this case, abridge appellants' rights of free speech, press and assembly in violation of the due process clause of the Fourteenth Amendment and the First Amendment to the United States Constitution.

2. Whether Section 14-53 of the General City Code of Fairfield, Alabama, upon which appellants' contempt convictions rest, on its face or as construed and applied in this case, abridges appellants' rights of free speech, press and assembly in violation of the due process clause of the Fourteenth Amendment and the First Amendment to the United States Constitution.

3. Whether consideration by the Supreme Court of the United States of a challenge on federal grounds to the validity of a municipal ordinance on its face, or as construed and applied, may be precluded where appellants are found in contempt of an ex parte temporary injunction which purports to enforce compliance with the ordinance, and the state court refuses to entertain the merits of the challenge on the procedural ground that appellants "chose to disregard the temporary injunction rather than contesting it by orderly and proper procedure," where the consequence of the state procedural rule is to nullify appellants' rights of free speech, press and assembly in violation of the due process clause of the Fourteenth Amendment and the First Amendment to the United States Constitution.

4. Whether appellants' convictions for contempt, being unsupported by any evidence of guilt, constitute wholly arbitrary official action and thereby violate the due process clause of the Fourteenth Amendment to the United States Constitution.

Statement of the Case

Appellant Fields is Information Director of the National States Rights Party. Appellant Lyons is Youth Organizer of the Party (R. 58). The Party, which stands for white supremacy and segregation (R. 53), has been on the ballot in Alabama (R. 60).

Sometime prior to Wednesday, October 11, 1961 (R. 44), the Party had handbills distributed in Fairfield which contained the following announcement (R. 42):

WHITE WORKERS
MEETING

*NIGGERS ARE TAKING OVER UNIONS!

*NIGGERS WANT OUR PARKS AND POOLS!

*NIGGERS DEMAND MIXED SCHOOLS!

Communists in NAACP and in Washington say
Whites Have No RIGHTS!
The Nigger gets everything he DEMANDS!

White Supremacy Can be saved
WHITES CAN STOP this second Reconstruction!

Hear Important Speakers From 4 States

Time—8 P. M. Date—Wed. Oct. 11

Place—5329 Valley Road

In Downtown Fairfield, Alabama

ABOVE THE CAR WASH

THUNDERBOLT Mobile Unit Will be Parked Out
Front Sponsored by National States Rights Party

Box 786, Birmingham, Alabama

PUBLIC INVITED

Come and Bring Your Friends

At about 5:00 P. M., Tuesday, October 10, 1961, the day before the scheduled meeting, the Mayor of Fairfield sent a notice to appellant Fields that he had violated a city ordinance which prohibited the distribution of handbills. The Mayor also informed Fields that another ordinance forbade public meetings without a permit (R. 43).

At about 6:00 P. M. the same evening, Fields phoned the Mayor at his home to discuss the issuance of a permit for the meeting (R. 36-38). Fields called the Mayor's office the morning of the following day and made an appointment for 2:00 P. M. that afternoon for further discussion (R. 55). Around noon of that day, however, Fields was served with an injunction (R. 25) forbidding him, the National States Rights Party, their servants, agents and employees, from holding the scheduled meeting and from distributing any handbills announcing the meeting. Fields did not keep his 2:00 P. M. appointment.

The injunction (R. 5-6) was issued on the *ex parte* application of the City of Fairfield. The Bill of Complaint (R. 1-4) alleged, among other things, that the appellants were "distributing handbills of an inflammatory nature designed to create ill will and disturbances between the races in the City of Fairfield," that the purpose of the announced meeting "is to create ill will, disturbances, and disorderly conduct between the races," and that the meeting "will constitute a public nuisance, injurious to the health, comfort, or welfare of the City of Fairfield and * * * is calculated to create a disturbance, incite to riot, disturb the peace, and disrupt peace and good order in the City of Fairfield."

About 7:30 P. M. on the evening of the scheduled meeting, appellants Fields and Lyons arrived at the meeting place to announce that the meeting site had been transferred to the city park at Lipscomb, a nearby town (R. 18,

26, 28, 49, 54, 60, 62, 63).[1] Subsequent to the service of the injunction, no meeting was held in Fairfield (R. 20, 48, 56), no handbills were distributed (R. 20, 24, 28, 44, 47, 54, 64, 72),[2] nor was there any disturbance whatsoever (R. 14, 26-30, 54).

Appellants were arrested for violating the injunction. On the following day, October 12, 1961, after a hearing, each was found in contempt and sentenced to serve 5 days in jail and pay a $50 fine.

The Alabama Supreme Court affirmed the convictions on the ground that the question of a statute's constitutionality may not be raised "in collateral proceedings on appeal from a judgment of conviction for contempt of the order or decree * * *"

Summary of Argument

I.

A. Sections 3-4 and 3-5 of the Code of Fairfield, which impose an absolute ban upon the distribution of handbills and circulars, are unconstitutional on their face. *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *Schneider* v. *State*, 308 U. S. 147 (1939); *Jamison* v. *Texas*, 318 U. S. 412 (1943); *Talley* v. *California*, 362 U. S. 60 (1960).

B. Section 14-53 of the City Code, which makes it unlawful for anyone to hold a public meeting in Fairfield "without first having obtained a permit from the Mayor to do so," is likewise unconstitutional on its face. *Lovell* v.

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[1] Earlier the same day, appellant Lyons and another person were prohibited by the police from entering the meeting place (R. 34, 50).

[2] Some copies of the Party's newspaper, *Thunderbolt*, were distributed near the original meeting place, but it contained no notice of the Fairfield meeting, nor had its distribution been enjoined. A copy of the newspaper is contained at R. 21.

Griffin, supra; Cantwell v. *Connecticut,* 310 U. S. 296 (1940); *Saia* v. *New York,* 334 U. S. 558 (1948); *Niemotko* v. *Maryland,* 340 U. S. 268 U. S. (1961); *Kunz* v. *New York,* 340 U. S. 290 (1951); *Staub* v. *Baxley,* 355 U. S. 313 (1958). Section 14-53, on its face, is a prior restraint, "a form of infringement upon freedom of expression to be sepecially condemned." *Burstyn* v. *Wilson,* 343 U. S. 495, 504. Emerson, *The Doctrine of Prior Restraint,* 20 L. and Contemp. Prob. 648 (1955). The ordinance does not embody "narrowly drawn, resonable and definite standards for the officials to follow" and has no "definite standards or other controlling guides governing the action of the Mayor * * * in granting or withholding a permit." *Niemotko* v. *Marylond, supra; Staub* v. *Baxley, supra.*

II.

A. The injunction and ordinances, as applied against the distribution of appellants' handbills, violated the rule of law established in *Near* v. *Minnesota,* 283 U. S. 697 (1931). In addition, the appellants were convicted not for violating the explicit terms of the injunction but rather for distributing copies of their newspaper which had not been expressly enjoined.

B. The injunction and ordinances, as applied against the appellants' meeting, even if valid as to a meeting to be held in the street or a public park, are clearly invalid when applied against a meeting to be held in a private hall. *DeJonge* v. *Oregon,* 299 U. S. 353 (1937); *Kunz* v. *New York, supra; Thomas* v. *Collins,* 323 U. S. 516 (1945).

III.

A. The decision of the Alabama Supreme Court that, on the authority of *United Mine Workers* v. *United States,* 330 U. S. 258 (1947), the appellants were foreclosed from challenging the constitutionality of the injunction against

them "in collateral proceedings on appeal from a judgment of conviction for contempt of the * * * decree," is in error. The *Mine Workers* doctrine does not apply where First Amendment rights are concerned. That case revolved around the question of conduct subject to statutory regulation rather than conduct fully protected by the Constitution. Second, it involved the complex problems of statutory interpretation in a factual setting that had not previously received judicial consideration. Third, it was concerned with the problem that arose in the context of an industrial dispute. In addition, *United Gas, Coke & Chemical Workers* v. *Wisconsin Employment Relations Board*, 340 U. S. 383 (1941), and *In the Matter of Green*, 369 U. S. 689 (1962), further support the view that appellants may not be foreclosed from testing the underlying validity of the injunction simply because they have asserted the right in the course of contempt proceedings.

Even in *Mine Workers* own terms, the injunction in this case was clearly frivolous and could be violated with impunity. All of the Justices in the *Mine Workers* case, except two, expressed the belief that there were circumstances where an order of the court was so frivolous that its violation could not be punished. The facts of this case come within that explicit exception.

B. As an original proposition, the primacy of First Amendment rights requires this Court to hold that the injunction's constitutionality may be tested by violating its terms. Failure to so hold will inevitably result in the suppression of First Amendment rights in a wide variety of circumstances heretofore fully protected. This rule must be adopted both in cases where the injunction and the ordinances on which they are based are clearly invalid, such as here, and in cases where their validity are open to question. No other rule will allow that "free and open encounter" which must be permitted immediately when concern for an issue of public importance is high.

That the municipal authorities thought that violence might erupt were appellants' meeting allowed to take place, does not change the situation. No one can be sure that a scheduled speech will go forward in the manner contemplated or that it will have the effect predicted. When a speaker "passes the bounds of argument or persuasion and undertakes incitement to riot" it is clear that the police can "prevent a breach of the peace." *Feiner* v. *New York*, 340 U. S. 315 (1951); *Rockwell* v. *Morris*, 12 A. D. 2d 272, affirmed 215 N. Y. S. 2d 502, cert. denied 368 U. S. 913. Compare *Kasper* v. *Brittain*, 245 F. 2d 92 (C. A. 6, 1957).

IV.

The convictions violated the due process clause of the Fourteenth Amendment because there was no evidence tending to prove the offense as charged. *Thompson* v. *Louisville*, 362 U. S. 199 (1960); *Garner* v. *Louisiana*, 368 U. S. 157 (1961). There is not a shred of evidence in the record to show that any of the handbills against which the injunction was directed were distributed. Likewise, there is no evidence that the appellants violated the order enjoining them from holding a public meeting in the City of Fairfield. The record clearly shows that "there was no meeting held."

ARGUMENT

I

The sections of the Code of Fairfield involved herein are unconstitutional and void on their face.

A. Sections 3-4 and 3-5 of the City Code.

Section 3-4 of the Code of Fairfield declares it "unlawful for any person to distribute or cause to be distributed on any of the streets, avenues, alleys, parks or any vacant property within the city any paper handbills, circulars, dodgers or other advertising matter". Section 3-5 similarly bans distribution of handbills by placing them in

automobiles. These statutes are almost identical to the statutes passed by the cities of Los Angeles, California, Milwaukee, Wisconsin, and Worcester, Massachusetts, and held unconstitutional in *Schneider* v. *State*, 308 U. S. 147 (1939). Each of the statutes there involved also placed an absolute prohibition upon the distribution of handbills on streets, sidewalks or parks of each of the respective municipalities. The Los Angeles Muncipal Code eaxmined in *Schneider* also forbade the placing of handbills in automobiles or vehicles just as § 3-5.

The Court through Justice Roberts declared that the statutes were unenforceable against the petitioners, each of whom had distributed leaflets on the public streets of the municipalities involved. The Court dismissed the respondents' argument that the statutes were a valid exercise of police power to prevent littering of the streets:

> "We are of opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it. Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press. This constitutional protection does not deprive a city of all power to prevent street littering. There are obvious methods of preventing littering. Amongst them is the punishment of those who actually throw papers on the streets." 308 U. S. at 162.

Similarly, *in Jamison* v. *Texas*, 318 U. S. 412 (1943), an absolute prohibition against the distribution of handbills was held unconstitutional as applied to a member of Jehovah's Witnesses who distributed handbills announcing a meeting of her group to hear an address by one of its leaders; and in *Talley* v. *California*, 362 U. S. 60, 65 (1960), a municipal ordinance which forbade the distribution of

handbills which did not bear the names of the persons who prepared, distributed or sponsored them was also held unconstitutional and "void on its face."

A statute is void on its face if it is so comprehensive that it forbids or punishes the normal and ordinary dissemination of information or is "not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets." *Lovell* v. *Griffin*, 303 U. S. 444, 451 (1938).

There is ample justification for declaring unconstitutional under all circumstances sweeping prohibitions against free speech and any punishment for violating these prohibitions. In one of its earlier free-speech cases, this Court said:

> "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which on its face, and as authoritatively construed, is so vague and indefinite to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment." *Stromberg* v. *California*, 283 U. S. 359, 369 (1931).

Similarly, this Court stated in *Terminiello* v. *Chicago*, 337 U. S. 1, 4-5 (1949):

> "A function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance as an idea. That is why freedom of speech • • • is • • •

> protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest. * * * There is no room under our constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislature, courts or dominant political or community groups."

The limited areas in which restrictions on free speech are constitutionally permitted are more adequately covered by specific statutes dealing with specific evils which can be constitutionally restricted. "There are appropriate public remedies to protect the peace and order of the community if appellant's speeches should result in disorder or violence." *Kunz* v. *New York*, 340 U. S. 290 (1951). Thus it follows that any comprehensive statute absolutely forbidding the dissemination of information must fall even without an inquiry as to its application in a particular case. If construed to cover only obscene literature and disorderly conduct, it is unnecessary.[3] If construed to cover more than these areas, it is invalid because of its repressive effect on constitutionally protected activity.

B. Section 14-53 of the City Code.

Section 14-53 of the General City Code of Fairfield makes it "unlawful" for anyone "to hold a public meeting" in Fairfield "without first having obtained a permit from the mayor to do so." A cursory examination of the ordinance shows quite clearly that it also "is invalid on its

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[3] It is clear that it is the function of the state courts to construe such statutes as being so limited. Unless the state court has restricted the application of the statute to these situations, this Court will assume that it is to be applied as written (*i.e.*, to cover all dissemination of information). See *Niemotko* v. *Maryland*, 340 U. S. 268 (1951); *Staub* v. *Baxley*, 355 U. S. 313 (1958). No restrictive limitations have been read into the Fairfield code by the Alabama courts. To the contrary, the Alabama Supreme Court, in this case, found them constitutional as written (R. 88).

face" (*Staub* v. *Baxley*, 355 U. S. 313, 321 (1958)) since it "makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official * * * by requiring a permit or license which may be granted or withheld in the discretion of such official" (*id.* at 322). It therefore imposes "an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." *Ibid.*; accord, e.g. *Cantwell* v. *Connecticut*, 310 U. S. 296, 305 (1940); *Kunz* v. *New York*, 340 U. S. 290, 293 (1951); *Lovell* v. *Griffin*, 303 U. S. 444, 451 (1938); *Niemotko* v. *Maryland*, 340 U. S. 268, 273 (1951); *Saia* v. *New York*, 334 U. S. 558, 559-60 (1948).

This Court has consistently considered a system of prior restraint as a more serious violation of the First Amendment than a system of subsequent punishment. As the Court stated in *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 504 (1952): "This Court recognized many years ago that such a previous restraint is a form of infringement upon freedom of expression to be especially condemned. *Near* v. *Minnesota*, 283 U. S. 697 (1931)." See also *Kunz* v. *New York*, 340 U. S. 290, 294-95 (1951). And as it further stated in *Bantam Books* v. *Sullivan*, 9 L. Ed. 2d 584, 593 (1963): "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." Accord, e.g., *Schneider* v. *State*, 308 U. S. 147, 164 (1939).

The reasons why prior restraints have received special constitutional condemnation have been eloquently discussed by members of this Court on previous occasions and need not be elaborated upon in any great detail. See, e.g., *Times Film Corp.* v. *Chicago*, 365 U. S. 43, 50 (1961) (dissenting opinion). Suffice it merely to quote a few select passages from the landmark article on the subject—Emerson, *The Doctrine of Prior Restraint*, 20 L. & Contemp. Prob. 648 (1955):

> "[1] A system of prior restraint * * * subjects to government scrutiny and approval *all* expression

in the area controlled—the innocent and borderline as well as the offensive, the routine as well as the unusual [p. 656]."

"[2] Under a system of prior restraint, the communication, if banned, never reaches the market place [of ideas] at all [p. 657]."

"[3] A system of prior restraint is so constructed as to make it easier, and hence more likely, that in any particular case the government will rule adversely to free expression [*ibid.*]."

"[4] Under a system of prior restraint, the issue of whether a communication is to be suppressed or not is determined by an administrative rather than a criminal procedure [*ibid.*]."

"[5] A system of prior restraint usually operates behind a screen of informality and partial concealment that seriously curtails opportunity for public appraisal and increases the chances of discrimination and other abuse [p. 658]."

"[6] Perhaps the most significant feature of systems of prior restraint is that they contain within themselves forces which drive irresistibly toward unintelligent, overzealous, and usually absurd administration [*ibid.*]."

"[7] [A] system of prior restraint * * * means, under most circumstances, less rather than more communication of ideas; it leaves out of account those bolder individuals who may wish to express their opinions and are willing to take some risk; and it implies a philosophy of willingness to conform to official opinion and a sluggishness or timidity in asserting rights that bodes ill for a spirited and healthy expression of unorthodox and unaccepted opinion [p. 659]."

"[8] A system of prior restraint is, in general, more readily and effectively enforced than a system of subsequent punishment. * * * A penal proceeding to enforce a prior restraint normally involves only a limited and relatively simple issue—whether or

not the communication was made without prior approval [*ibid.*]."

This Court has recognized, however, that a general and nondiscriminatory piece of legislation which merely regulates "the times, the places, and the manner of soliciting upon streets, and of holding meetings thereon" (*Cantwell* v. *Connecticut*, *supra* at 304) will be upheld as a valid regulatory statute (see, *e.g.*, *Cox* v. *New Hampshire*, 312 U. S. 569 (1941); *Kovacs* v. *Cooper*, 336 U. S. 77 (1949)). The general theory behind the upholding of this type of statute is that streets, parks and other public places may be reasonably regulated for the general interest, comfort and convenience of all the citizenry or in consonance with the peace, good order and public safety of the community. See, *e.g.*, *Hague* v. *C.I.O.*, 307 U. S. 496, 515 (1939); *Lovell* v. *Griffin*, *supra* at 451.

If, however, a statute does not embody "narrowly drawn, reasonable and definite standards for the officials to follow" (*Niemotko* v. *Maryland*, *supra* at 271), if a statute has no "definitive standards or other controlling guides governing the action of the Mayor and Council in granting or withholding a permit" (*Staub* v. *Baxley*, *supra* at 322), it does not come within the exception to the general rule and must be struck down as an unconstitutional prior restraint. Since Section 14-53 of the Fairfield Code prohibits the holding of public meetings "of any kind at any time, at any place, and in any manner without a permit from the * * * [mayor]" (*Lovell* v. *Griffin*, *supra* at 451), it cannot be saved from unconstitutional invalidity. Moreover, since "the ordinance is void on its face, it was not necessary for appellant to seek a permit under it." *Lovell* v. *Griffin*, *supra* at 452-53.

II

The ordinances and the injunction issued pursuant to them are unconstitutional as applied.

What is particularly aggravating about the present case is that, not only were the defendants absolutely prohibited by Section 3-4 and 3-5 of the Fairfield Code from distributing their handbills announcing the meeting and prohibited by Section 14-53 from holding the meeting without permission from the mayor, but they were also enjoined in advance by the issuance of a temporary injunction "from holding a public meeting * * * as announced, and from distributing further * * * handbills announcing such meeting such as were [previously] distributed * * * " (R. 6).

We have already noted (*supra*, Part IB) that, with certain limited exceptions, administrative prior restraints are unconstitutional, being considered "as a form of infringement upon freedom of expression to be especially condemned" (*Joseph Burstyn, Inc.* v. *Wilson*, *supra* at 504). Judicial prior restraints are to be sanctioned no more than administrative ones. See, *e.g.*, *Near* v. *Minnesota*, *supra*; *Thomas* v. *Collins*, 323 U. S. 516 (1945).

A. Sections 3-4 and 3-5 of the City Code.

The injunction against the distribution of the handbills was a particularly noxious constitutional violation in view of the rule of law established in *Near* v. *Minnesota*, *supra*. In that case, the state court enjoined the defendants from issuing "any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law" (283 U. S. at 706). The Supreme Court held the statute and injunction to be a prior restraint abridging the freedom of the press. Chief Justice Hughes, speaking for the majority, stated that "the statute in question does not deal with punishments; it provides for no punishment, ex-

cept in cases of contempt for violation of the court's order, but for suppression and injunction, that is, for restraint of publication" (*id.* at 715). The Chief Justice went on to enunciate the doctrine of prior restraint as applied to the freedom of the press (*id.* at 716):

> "The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant principally, although not exclusively, immunity from previous restraints and censorship."

See *Joseph Burstyn, Inc.* v. *Wilson, supra* at 504. The Court further noted that "the immunity of the press from previous restraint" was not made less necessary by the fact that "miscreant purveyors of scandal" may abuse the freedom of the press. Quite the contrary, "subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege" (*id.* at 720). Cf. *Kunz* v. *New York, supra* at 294-95. When, as in the present case, an injunction issues to prevent the distribution of literature, and especially when that injunction is pursuant to an unconstitutional statute, the injunction must be considered invalid as a prior restraint unconstitutionally infringing on the appellants' freedom of press.

Indeed, in the present case, the violation is all the more serious since the trial court explicitly found that there was "no evidence that the pamphlet was distributed" (R. 72). What the court in fact acknowledged was that the defendants had distributed copies of their newspaper, *The Thunderbolt* (see R. 21), which had not been expressly enjoined. Although it was admitted that there was no announcement of the meeting in the issue distributed (see R. 23, 25), the court held that the newspaper "was an artifice on the part of someone to bring home the fact that the meeting was going to be held while artfully evading the exact language of the handbill that had been previously distributed" (R.

72). Thus, the high order of protection conferred by the Constitution on the freedom of the press was arrantly disregarded. Indeed, even if Sections 3-4 and 3-5 had been constitutional on their face and even if the injunction against the original handbills had been valid, the Statute and injunction would have had to be declared unconstitutional as applied in the present case since, unlike even the statute in *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436, 445 (1957), they failed to withhold "restraint upon matters not already published and not yet found to be offensive."

B. Section 14-53 of the City Code.

The reasons for invalidating Section 14-53 of the Fairfield Code as an unconstitutional prior restraint (see *supra*, part I B) are equally applicable for purposes of invalidating the injunction issued pursuant to the ordinance.

The record here is barren of evidence of any danger of violence, even is such evidence were relevant. See Part III (B) (3), *infra*. The plaintiff's bill of complaint contains no factual allegations to support its conclusions that the purpose of the meeting was "to create ill will and disturbances between the races," and that it "will constitute a public nuisance, injurious to the health, comport, or welfare of the City of Fairfield and * * * is calculated to create a disturbance, incite to riot, disturb the peace, and disrupt the peace and good order in the City of Fairfield" (R. 2). The record clearly shows that a meeting held by the defendants on the previous evening had been "a very peaceable, normal meeting" (R. 47). Moreover, the police officer who arrested appellant Fields admitted that there was no disturbance of any kind at the site of the scheduled meeting either before or at the time of the arrest. He further testified that he did not see Dr. Fields fight with anyone, that there was "no trouble at all" and that the entire situation was "very peaceful" (R. 19).

Even if the prior restraint had been valid as to a meeting held in the street or a public park it could hardly have been

applicable to a meeting of the National States Rights Party —a political party—which was to be held in a private hall, "above the Car Wash" (R. 4). See *Kunz* v. *New York*, *supra* at 307 (Jackson, *J.*, dissenting). This Court has consistently circumscribed the power asserted by a State to prohibit a peaceful public meeting held in a private hall merely because the purpose of the meeting was disagreeable to the government.

Thus, for example, in *De Jonge* v. *Oregon*, 299 U. S. 353 (1937), De Jonge's "sole offense as charged * * * was that he had assisted in the conduct of a public meeting, albeit otherwise lawful, which was held under the auspices of the Communist Party" (299 U. S. at 362). The Court, holding the conviction repugnant to the due process clause of the Fourteenth Amendment, said (*id.* at 365):

> "The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which a meeting is to be held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge."

Similarly, in *Thomas* v. *Collins*, 323 U. S. 516 (1945), an official of a labor union was held in contempt of a restraining order—issued *ex parte*, as here—that forbade him from violating a Texas statute regulating the solicitation of membership in trade unions. The order was issued in anticipation

of a meeting at which the appellant was scheduled to speak. He appeared and spoke at the meeting, and was held in contempt. The Court, holding that the statute contravened the First Amendment, stated, (323 U. S. at 536):

> "The assembly was entirely peaceable, and had no other than a wholly lawful purpose. The statements forbidden were not in themselves unlawful, had no tendency to incite to unlawful action, involved no element of clear and present, grave and immediate danger to the public welfare. * * * We have here nothing comparable to the case where use of the word 'fire' in a crowded theater creates a clear and present danger which the State may undertake to avoid or against which it may protect. *Schenck* v. *United States*, 249 U. S. 47."

What was thus involved was the basic right of freedom of expression which could not be circumscribed. As the Court explained (*id.* at 540):

> "If the exercise of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance their exercise and for imposing a penalty for violating such a restraining order. So long as no more is involved than exercise of the rights of free speech and free assembly, it is immune to such a restriction. * * * We think that a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment."

The holdings in *De Jonge* and *Thomas* have direct applicability here. The sentencing court revealed quite candidly the true purpose for issuing the restraining order. As it stated (R. 72):

> "Back several years ago we did have a movement to move into one of our public parks here but that

> was straightened out within a matter of a few weeks. * * * And it is the intention, I know, of the public officials * * * that we are going to do everything we can to maintain that status quo. We are going * * * to do everything that we can to keep people from agitating trouble."

Since, however, a State "may not suppress free communication of views * * * under the guise of preserving desirable conditions" (*Cantwell* v. *Connecticut, supra* at 308), the court order, pursuant to Section 14-53, enjoining the meeting from taking place, was clearly an unconstitutional prior restraint. We believe that a municipality has *no* power to grant or deny the right to meet on private property except as to non-discriminatory regulations intended to control structural or fire hazards—which is not to say it has not the power to invoke the criminal law for valid offenses committed on the private premises. See Part III(B)(3), *infra*.

III

Appellants were not foreclosed from testing the injunction's constitutionality by violating its terms.

It was the view of the Alabama Supreme Court that, on the authority of *United Mine Workers* v. *United States*, 330 U. S. 258 (1947), the appellants were foreclosed from challenging the constitutionality of the injunction against them "in collateral proceedings on appeal from a judgment of conviction for contempt of the * * * decree" (R. 89). The court's reliance on *Mine Workers* is misplaced.

Although Alabama may, if it chooses, adhere to *Mine Workers* as a matter of state law in a variety of cases, its reliance on the doctrine of that case where First Amendment rights are concerned cannot be sustained. We point out below (A) that the *Mine Workers* doctrine, by its own terms, has no application to free speech cases in general,

and (B) that *Mine Workers* aside, this Court must find that appellants have the right to attack the constitutionality of both the ordinances and injunction in the course of contempt proceedings.

A. The *Mine Workers* doctrine does not apply to First Amendment cases.

Mine Workers involved at least three essential elements which are absent here. First, *Mine Workers* revolved around a question of conduct subject to statutory regulation rather than conduct fully protected by the Constitution. Second, it involved a complex problem of statutory interpretation[4] in a factual setting that had not previously received judicial consideration. Third, it was concerned with a problem that arose in the context of an industrial dispute.

In the instant case, the subject matter of the dispute is plainly protected by the Constitution—more particularly, the First Amendment which deals with "preferred rights." The qualitative distinction between conduct which may be regulated by statute and conduct which is specially protected by the Constitution, is pointed out in *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639 (1943):

> "The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect."

Second, there is no substantial doubt to be resolved either about the scope of the rights asserted here or about

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[4] The Norris-LaGuardia Act, 47 Stat. 70, c. 90, 29 U. S. C. § 101.

the invalidity of the ordinances in question. The rights are clearly protected and the ordinances patently unconstitutional. See Parts I and II, *supra*. Although this case, like *Mine Workers*, has evoked "extended argument, lengthy briefs, [and] study and reflection," to use Mr. Justice Frankfurter's words (330 U. S. at 310), those exertions have been forthcoming not because they are necessary "before final conclusions could be reached regarding the proper interpretation of the legislation controlling this case," but merely to demonstrate that those conclusions regarding the First Amendment have been reached by this Court long ago.[5]

Third, where industrial conflicts are concerned, this Court has frequently set such cases apart from the mainstream of First Amendment cases even though, in one respect or another, they contain elements of speech, assembly or press.[6] But where political liberty is concerned—and we remind the Court that the association which is one of the appellants here is a political party—the limitations that may be imposed on union activity have no application whatsoever. This is particularly the case where

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[5] Compare Mr. Chief Justice Vinson's observation that:

> "We insist upon the same duty of obedience where, as here, the subject matter of the suit, as well as the parties, was properly before the Court; where the elements of federal jurisdiction were clearly shown; and where the authority of the Court of first instance to issue an order ancillary to the main suit depended upon a statute, the scope and applicability of which were *subject to substantial doubt*." 330 U. S. at 294 (emphasis supplied)

Mr. Justice Frankfurter described the issue in the case as "complicated and novel." 330 U. S. at 310.

[6] See, for example, *Local Union 10* v. *Graham*, 345 U.S. 192 (1953); *Hughes* v. *Superior Court*, 339 U. S. 460 (1950); *Building Service Employees* v. *Gazzam*, 339 U. S. 532 (1950); *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490 (1949); *Carpenters and Joiners Union* v. *Ritter's Cafe*, 315 U. S. 722 (1942).

the rights asserted by the party are not only of constitutional dimension, but where they are without question fully protected by the Constitution as well.

In addition, two cases decided since *Mine Workers* further support the view that appellants may not be foreclosed from testing the underlying validity of the injunction simply because they have asserted the right in the course of contempt proceedings.

In *United Gas, Coke and Chemical Workers* v. *Wisconsin Employment Relations Board*, 340 U. S. 383 (1951), petitioners had been prohibited from striking by an ex parte restraining order under the terms of the Wisconsin Public Utility Anti-Strike Law, and found in contempt.

This Court reversed. It found that Congress, under the National Labor Relations Act of 1935 as amended, had occupied the field of peaceful strikes for higher wages in the industry the state sought here to regulate. *Mine Workers* is not to be found in the majority or dissenting opinions.

In *In the Matter of Green*, 369 U. S. 689 (1962), Green was an attorney representing a labor union. A labor-management controversy arose and the employer obtained an injunction from the Ohio state courts forbidding union members from picketing. The injunction was issued ex parte. Green believed the order was invalid because issued without a hearing required by state statute and because the controversy was properly one for the National Labor Relations Board. Consequently, he advised the union officials that the restraining order was invalid and that the best way to contest it was to continue picketing and, if the pickets were held in contempt, to appeal and test the order of commitment by habeas corpus.

The plan was followed and four pickets were arrested. At the hearing on the contempt charge, Green informed the

court that it was he who had advised the union to test the injunction by risking contempt. He was held in contempt for disobeying "a lawful writ, process, order, rule, judgment, or command, of the court under the Ohio statutes."

This Court reversed. It held that "a state court is without power to hold one in contempt for violating an injunction that the state court had no power to enter by reason of federal preemption." 369 U. S. at 692. The case was remanded for a hearing to determine whether the state court was acting in a field reserved exclusively by Congress for the federal agency. *Mine Workers* was distinguished on the ground that it "involved a restraining order of a federal court and presented no question of preemption of a field by Congress where, if federal policy is to prevail, federal power must be complete." Id. note 1.[7]

United Gas and *Green* both indicate that when a state court's power to issue an injunction in a labor dispute has been withdrawn by Congress, which vested an administrative agency and the federal courts with authority to act in that area, an injunction issued by a state court which has presumed to exercise its jurisdiction may be disobeyed. *A fortiori*, when the power of a state court to act is foreclosed by the Constitution as in this case, any injunction which it issues may likewise be disobeyed with impunity.[8]

1. *Even in Mine Workers own terms, the injunction in this case was clearly frivolous and could be violated with impunity.*

Although Mr. Chief Justice Vinson's opinion in *Mine Workers* nominally held that even if the restraining order

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[7] Cf. *NAACP* v. *Alabama*, 357 U. S. 449 (1958).

[8] Prior to *Mine Workers*, of course, this Court had held that the validity of judicial orders could be collaterally tested by violating them. *Ex Parte Rowland*, 104 U. S. 604 (1882); *Ex Parte Fisk*, 113 U. S. 713 (1885); *Ex Parte Ayers*, 123 U. S. 443 (1887); *In Re Sawyer*, 124 U. S. 200 (1888).

were found invalid, its validity could not be tested by violating its terms,[9] he added that, "A different result would follow were the question of jurisdiction frivolous and not substantial * * *" 330 U. S. at 293.

Mr. Justice Frankfurter, who held that the restraining order in *Mine Workers* could not be disobeyed even though invalid (as he believed it to be), also declared that a different result would follow if the question of jurisdiction were frivolous. He compared the questions presented in the case before him with "a question so frivolous that any judge should have summarily thrown the Government out of court without delay" 330 U. S. at 309.

> "Only when a court is so obviously traveling outside its orbit as to be merely usurping judicial forms and facilities may an order issued by a court be disobeyed and treated as though it were a letter to a newspaper. Short of an indisputable want of authority on the part of a court, the very existence of a court presupposes its power to entertain a controversy, if only to decide after deliberation that it has no power over the particular controversy.
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> "To be sure, an obvious limitation upon a court cannot be circumvented by frivolous inquiry into the existence of a power that has unquestionably been withheld. Thus, the explicit withdrawal from federal district courts of the power to issue injunc-

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[9] The Chief Justice and the two Justices who joined in his opinion, believed the order valid. Though they went on to declare that even if the order were void the defendants were none the less required to obey it, that much of their opinion was unnecessary to their decision and therefore not binding. Justices Black and Douglas likewise found the order valid, but therefore thought it unnecessary to decide the academic problem of a void order. Justices Murphy and Rutledge concluded both that the order was void and the contempt conviction therefore invalid. Only Justices Frankfurter and Jackson held the contempt conviction valid even though the order on which it was based was, in their opinion, invalid. Thus, of nine Justices writing five opinions, only Justices Frankfurter and Jackson squarely adopted the proposition relied upon by the Alabama Supreme Court.

> tions in an ordinary labor dispute between a private employer and his employees cannot be defeated, and an existing right to strike therefore impaired, by pretending to entertain a suit for such an injunction in order to decide whether a court has jurisdiction. In such a case, a judge would not be acting as a court. He would be a pretender to, not a wielder of, judicial power." 330 U. S. at 309-310 [10]

No member of the *Mine Workers* Court undertook to supply a precise definition of a frivolous void order. It is enough for the purposes of this case that the injunction under scrutiny, being so patently violative of appellants' First Amendment freedoms, be declared a nullity from start to finish. The injunction was an assertion of power based upon ordinances which, as we have shown above, are not arguably constitutional. In addition, the power not only was asserted to intrude upon the preferred constitutional rights of free speech, free press and free assembly, it presumed to do so in the form of a prior restraint, a particularly objectionable kind of censorship. See *Congress of Racial Equality* v. *Douglas*, 318 F. 2d 95 (C. A. 5, 1963).

B. The primacy of First Amendment rights requires this Court to hold that the injunction's constitutionality may be tested by violating its terms.

1. The injunction lays a forbidden burden on First Amendment Rights.

Although we have discussed *Mine Workers* in order to meet the Alabama Supreme Court on its own ground, we

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[10] All the Justices except two expressed the belief that there were circumstances where an order of a court was so frivolous that its violation could not be punished. Justices Black and Douglas, the exceptions, expressed no view because, believing the *Mine Workers* order valid, they declined to speculate on the consquences of violating a void order.

believe as an original proposition that the doctrine of that case has no place in First Amendment cases.[11]

Professor Paul Freund, in discussing the differences (and similiarities) between prior restraint and subsequent punishment, notes one particularly crucial difference where restraining orders or temporary injunctions are concerned:

> "If disobedience of the interim order is *ipso facto* contempt, with no opportunity to escape by showing the invalidity of the order on the merits, the restraint does indeed have a chilling effect beyond that of a criminal statute.[12]

It is precisely that "chilling effect" which is at stake in this case.

The consequence of investing court orders, no matter how void or oppressive, with impenetrable sanctity,[13] is

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[11] The three principal commentators on *Mine Workers* think it unworkable in any case. Watt, the Divine Right of Government by Judiciary, 14 Univ. of Chicago Law Rev. 409 (1947); Cox, The Void Order and the Duty to Obey, 16 Univ. of Chicago Law Rev. 86 (1948); Chafee, Some Problems of Equity (Univ. of Mich. Law School, 1950) Chapters VIII and IX.

[12] The Supreme Court and Civil Liberties, 4 Vanderbilt Law Rev. 533, 539 (1951). Professor Freund goes on to say:

> "To the extent, however, that local procedure allows such a defense to be raised in a contempt proceeding, the special objection to prior restraint growing out of the problem of interim activity is obviated."

We agree, but it is our fundamental thesis that the question of collateral attack is not just a matter of "local procedure."

[13] To the extent that *Mine Workers* may be based upon the respect due the courts, that consideration must give way under the circumstances of this case. This is the very situation anticipated by Mr. Justice Frankfurter when he spoke of a court "so obviously traveling outside its orbit that it is merely usurping judicial forms and facilities."

The "orbit" referred to is the traditional function of courts, but the acts of the Circuit Court in this case clearly go beyond that

made plain in this case. It is beyond question that the appellants could not have been punished for distributing their newspaper and holding their meeting if they had been prosecuted directly under the ordinances in issue; and the unconstitutionality of those ordinances could have properly been raised as a defense. *Staub* v. *Baxley, supra.* But the City of Fairfield, by interposing a temporary injunction between appellants and the same ordinances, has devised a method that, if ratified by this Court, will allow circumvention of the *Staub* doctrine and confer on the states a technique to nullify the precise purpose the First Amendment is intended to serve—full discussion of all matters of public concern, which Mr. Justice Brandeis called "a political duty." [14]

Public issues are frequently short run, and if the government were empowered to suppress discussion by the use of an injunction, issued as here on the flimsiest grounds, the purpose of the discussion may well have passed by the time the appellate remedies were exhausted. For example, it would enable a political candidate to be enjoined from speaking during the campaign period preceding the day of election. If he violated the injunction he would be imprisoned; if he bowed to the injunction and tested its validity in "orderly and proper proceedings," the election will have long been over. In either case, the electorate would not

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function. That is, the decision by the Circuit Court—that the state of events was such that public order would best be maintained by prohibiting appellants' meeting—is a decision to be made, if ever, by the police. See, e.g., *Feiner* v. *New York*, 340 U. S. 315 (1951). But conceding that the States may empower their courts to make such police-type decisions (see *Kingsley Books* v. *Brown*, 354 U. S. 436 (1957)), the States must also be prepared to have the decisions of their courts subject to the same scope of review as the decision of the police in *Feiner*.

[14] *Whitney* v. *California*, 274 U. S. 357, 376 (1927) (concurring opinion).

have heard him and the electoral process—perhaps the raison d'être of free speech—would be crippled.[15]

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[15] The increasing reliance on *ex parte* preliminary injunctions—and the threat they pose to the First Amendment—is indicated by the following examples.

In April 1962, an Alabama Circuit Court Judge issued a temporary injunction against the President, student body and faculty of Talladega College, members of the Student Non-Violent Coordinating Committee, the Congress of Racial Equality, and several individuals, forbidding the respondents from "engaging in, sponsoring or encouraging unlawful street parades, unlawful demonstrations, unlawful boycotts, unlawful trespass, and unlawful picketing." *State of Alabama* v. *Arthur D. Gray, et al.*, Circuit Court of Talladega County, in Equity, No. 9760.

A few days before election day in 1962, a judge of the California Superior Court issued a temporary restraining order prohibiting the distribution of a booklet which "implied that Governor Edmund G. Brown and other Democratic incumbents were soft on communism." A hearing on the injunction was set for November 7th, the day after election day. *New York Times*, October 30, 1962, p. 22. On November 9th, the Democratic State Committee, the plaintiffs, agreed to the dissolution of the restraining order. At the same time Mr. Richard Nixon's campaign manager asked for the dissolution of a restraining order that had been issued prohibiting distribution of two anti-Nixon pamphlets. *New York Times*, November 10, 1962.

On November 29, 1962 a Justice of the New York State Supreme Court issued a temporary restraining order prohibiting Herbert Aptheker from addressing the student body of the University of Buffalo on the ground that Aptheker was a member of the National Committee of the Communist Party, *New York Times*, November 30, 1962.

On April 10, 1963, an Alabama Circuit Court Judge issued a temporary injunction prohibiting anti-segregation demonstrations in Birmingham. Dr. Martin Luther King and others were arrested two days later for violating the injunction. *New York Times*, April 23, 1963, p. 20. Their convictions are now on appeal to the Alabama Supreme Court.

In Tallahassee, Florida, a Circuit Court Judge issued a temporary restraining order on May 29, 1963 prohibiting anti-segregation demonstrations. Two hundred and fifty-seven demonstrators

It was danger of this magnitude that Mr. Justice Rutledge foresaw in his prophetic dissent in *Mine Workers*:

> "It would also be in practical effect for many cases to terminate the litigation, foreclosing the substantive rights involved without any possibility for their effective appellate review and determination.
>
> "This would be true, for instance, wherever the substantive rights asserted or the opportunity for exercising them would vanish with obedience to the challenged order. Cf. *Ex Parte Fisk*, 113 U. S. 713. The First Amendment liberties especially would be vulnerable to nullification by such control. Thus the constitutional rights of free speech and free assembly would be brought to naught and censorship established widely over those areas merely by applying such a rule to every case presenting a substantial question concerning the exercise of those rights. This Court has refused to countenance a view so destructive of the most fundamental liberties. *Thomas v. Collins*, 323 U. S. 516. These and other constitutional rights would be nullified by the force of invalid orders issued in violation of the constitutional provisions securing them, and void for that reason. The same thing would be true also in other cases involving doubt, where statutory or other rights asserted or the benefit of asserting them would vanish, for practical purpose, with obedience." 330 U. S. at 352.

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were arrested on May 30 for violating the order. *New York Times*, May 31, 1963, p. 1.

On June 6, 1963, a Mississippi Chancery Court Judge issued a temporary injunction barring civil rights demonstrations in Jackson. Thirteen local and national civil rights leaders, the NAACP, CORE, and the trustees of Tougaloo Christian College were specifically named in the order. *New York Times*, June 7, 1963, p. 14.

For an account of the destruction by injunction of a dissident political movement, the International Workers of the World, see Chafee, Free Speech in the United States (Harvard University Press, 1946) 326-342.

> "Then also the liberties of our people would be placed largely at the mercy of invalid orders issued without power given by the Constitution and in contravention of power constitutionally withheld by Congress." 330 U. S. at 354.

By obtaining an *ex parte* injunction, and punishing for contempt, the respondents have attempted to convert otherwise unconstitutional and void statutes into ones which can successfully restrain and punish activities which would be protected in the other situations described. However ingenious the City of Fairfield may be, it cannot punish appellants' constitutionally protected behavior. See *Thomas* v. *Collins*, 323 U. S. at 540.[16]

2. Even if the ordinances or injunction here were arguably constitutional, their validity could be tested in contempt proceedings.

We urge, of course, that the ordinances in issue are undeniably invalid on their face. But even if the ordinances or injunction were arguably constitutional, that would not alter appellants' right to test their validity in a contempt proceeding. In any case involving the First Amendment it is irrelevant how the municipal authorities presume to suppress speech or assembly. Whether it be by punishment for not seeking a permit if one is ostensibly required (*Staub* v. *Baxley*, *supra*), or by contempt for violating an injunction against such speech or dissemination (*Thomas* v. *Collins*, *supra*), the result must be the same. The focus must be upon the activity sought to be engaged in, not the state's procedural scheme.

The only restrictions on speech or assembly which a state or municipality can impose in consonance with the

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[16] *Kingsley Books* v. *Brown*, 354 U. S. 436 (1957) is not to contrary. Though it upheld an injunctive scheme for the suppression of obscene publications, it expressly left open the question whether the issue of obscenity could be tested by violating the injunction. 354 U. S. at 443, n. 2.

preferred status of the First Amendment freedoms are general and non-discriminatory regulations dealing with soliciting and holding meetings upon the streets, parks and public places of a town or city. The most that a municipality can require even in this area is that an individual or group request a permit for use of the public street or parks so that the authorities can determine whether a conflicting meeting was scheduled. See Parts I and II, *supra*.

If a permit is wrongfully refused, the meeting or solicitation must be allowed notwithstanding, and a plenary examination of the basis of the refusal—including the constitutionality of applicable statutes—will subsequently be allowed in the courts. See the cases related in *Staub* v. *Baxley*, *supra* at 323-324, notes 6-12.[17] *A fortiori*, no injunction can be issued which would force a postponement of the speech or solicitation until the validity of the injunction has been determined. To proceed in the face of an injunction or a refusal to issue a permit is the only way to prevent circumvention of First Amendment privileges by overzealous officials bent on "maintain[ing] the status quo" (R. 72).[18]

Milton wrote in Areopagitica:

> "And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the fields,

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[17] Insofar as *Poulos* v. *New Hampshire*, 345 U. S. 395 (1953) suggests the contrary, it has been overruled by *Staub*. Any rule that would permit municipalities to forbid a speech or assembly and force prior adjudication of the right, is inconsistent with the Fourteenth Amendment.

[18] See *State ex rel. Liversey* v. *Judge of Civil District Court*, 34 La. Ann. 741 (La. Sup. Ct., 1882); *Ex Parte Tucker*, 110 Tex. 335, 220 S. W. 75 (Tex. Sup. Ct., 1920); *State* v. *Morrow*, 57 Ohio App. 30, 11 N. E. 2d 273 (Ohio Ct. of App., 1937); *Ex Parte Henry*, 147 Tex. 315, 215 S. W. 2d 588 (Tex. Sup. Ct., 1948), each of which recognizes that the First Amendment can be served only by allowing an injunction to be attacked in the course of contempt proceedings.

> we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehead grapple; who ever knew Truth put to the worse in a free and open encounter?"

If these words are to have any force in the present day, the "free and open encounter" must be permitted immediately when public concern is high and can be directed against the falsehood or injustice revealed by the speech. The headlines of one day are forgotten the following week and if the full truth about any public issue is to come before the public, all parties with something to say must have the same immediate opportunity to present their views.

3. Nor is speculative violence justification for supressing appellants' meeting.

Even if the municipal authorities thought that violence would erupt were a permit to be issued, and secured an injunction or refused a permit on that basis, the meeting must be allowed to proceed. No one can be sure that the speech that is scheduled will go forward in the manner contemplated or that it will have the effect predicted.

> "A community need not wait to be subverted by street riots and storm troopers; but, also, it cannot, by its policemen or commissioners, suppress a speaker, in prior restraint, on the basis of news reports, hysteria or inference that what he did yesterday, he will do today. Thus, too, if the speaker incites others to immediate unlawful action he may be punished in a proper case, stopped when disorder actually impends; but this is not to be confused with unlawful action from others who seek unlawfully to suppress or punish the speaker. *Matter of Rockwell* v. *Morris*, 12 A. D. 2d 272, 281 (1st Dept. 1961), aff'd 215 N. Y. S. 2d 502 (1961), cert. denied 368 U. S. 913 (1961).

When a speaker "passes the bounds of argument or persuasion and undertakes incitement to riot" it is clear that the police can "prevent a breach of the peace," *Feiner*

v. *New York*, 340 U. S. 315, 320-21 (1951). It is at that point and not before that municipal and state authorities can act. And there is no doubt that they have the means to act effectively when that point is reached.[19]

Speech often rouses to anger, and the public's concern with social and political issues may often reach a disturbing pitch. It is easy for a municipal officer to equate the public order with the status quo and political agitation with a breach of the peace. As Learned Hand wrote during World War I:

> "Political agitation, by the passions it arouses or the convictions it engenders may in fact stimulate men to the violation of the law. Detestation of existing policies is easily transformed into forcible resistance of the authority which puts them into execution; and it would be folly to disregard the causal relation between the two. Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government. The distinction is not a scholastic subterfuge but a hard fought acquisition in the fight for freedom * * *." *Masses Pub. Co.* v. *Patten*, 244 Fed. 535, 541 (S. D. N. Y. 1917) *rev.* 246 Fed. 24 (2d Cir. 1917).

It is not for the municipal authorities to decide in advance what the effect of a speech may be. They can act if or when "political agitation" becomes an "incitement

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[19] Cf. *Kasper* v. *Brittain*, 245 F. 2d 92 (C. A. 6, 1957), cert. denied 355 U. S. 834 (1957), where a criminal conviction for contempt of an *ex parte* restraining order was upheld against First Amendment objections where the evidence clearly showed advocacy of immediate action that in fact resulted in illegal mob conduct which required the presence of the State Patrol and the National Guard to restore order.

to violent resistance."[20] Necessarily this means that the speech must go forward at its scheduled time subject only to a reasonable restriction on use of the public streets or parks. No other rule can lead to the emergence of the truth, which alone guarantees the survival of free government and justifies its continued existence.

IV

The convictions violated the Due Process Clause of the Fourteenth Amendment because there was no evidence tending to prove the offenses charged.

In *Garner* v. *Louisiana*, 368 U. S. 157, 163 (1961), the Court held that a conviction in a State court must be set aside under the Due Process Clause if it is "totally devoid of evidentiary support." Accord, *Thompson* v. *City of Louisville*, 362 U. S. 199 (1960). The rationale of *Garner* and *Thompson* is not whether the evidence in the record is insufficient to support the conviction, but whether there is any evidence at all tending to prove one or more of the essential elements of the offense. See *Garner* v. *Louisiana*, *supra*, 368 U. S. at 163-64. "In addition," as the Court stated in *Garner*, the concern is not "whether the evidence proves the commission of some other crime, for it is as much a denial of due process to send an accused to prison following conviction for a charge that was never made as it is to convict him upon a charge for which there is no evidence to support that conviction" (*id.* at 164). The decisions in *Garner* and *Thompson* are directly applicable to the present case.

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[20] The Court of Appeals for the Fifth Circuit, in a recent case involving an injunction against the Congress of Racial Equality, said:

> "These fundamental rights to speak, assemble, seek redress of grievances and demonstrate peacefully in pursuance thereto cannot be abridged merely because a riot might be threatened to be staged or that police officers are afraid that breaches of the peace will occur if these rights are exercised." *Congress of Racial Equality* v. *Douglas*, 318 F. 2d 95, 102.

A. There was no evidence tending to prove that petitioners violated the injunction as it related to Sections 3-4 and 3-5 of the Fairfield City Code.

The injunction issued against the petitioners enjoined them "from holding a public meeting at 8 P. M. on Wednesday, October 11, 1961, at 5329 Valley Road, Fairfield, Alabama * * * and from distributing further * * * handbills announcing such meeting such as were distributed in the City of Fairfield, Alabama, on October 10, 1961. * * * *" (R. 6)

There is not a shred of evidence in the record to show that any of the handbills were distributed after the issuance of the temporary restraining order. Not a single police officer saw any of the handbills distributed (see, *e.g.*, R. 20, 28, 32). Both appellant Fields (R. 54) and his wife (R. 64) testified that none of the handbills had been distributed following issuance of a restraining order. In fact, Police Officer Misso testified that "the building was padlocked" and that his orders were "to keep everybody out" (R. 34), and appellant Fields affirmed that he had been refused entrance to the hall to pick up the literature (R. 50). Even the lower court admitted that there was "no evidence that the pamphlet was redistributed" (R. 72).

The only literature that was distributed after the injunction was issued was several copies of appellants' newspaper *The Thunderbolt* (R. 18, 22-23, 28), which contains not one word relating to the meeting. This point was affirmed by Officer Misso (R. 23, 25).

Faced with this complete lack of evidence, the City of Fairfield attempted to prove that Fields had nevertheless accomplished his purpose by distributing *The Thunderbolt* because, as counsel for the City stated (R. 70):

> "[T]he Thunderbolt * * * has the same sort of agitation in it, the same sort of tendency to induce a breach of the peace, to induce disturbances between the races, to induce disorderly conduct."

The lower court also attempted to square the circle by stating (R. 72):

> "I am impressed by the tone and the context of the paper that was admittedly distributed and I simply think that was an artifice on the part of someone to bring home the fact that the meeting was going to be held while artfully evading the exact language of the handbill that had been previously distributed."

And the Supreme Court of Alabama avoided the whole issue by stating (R. 88):

> "There is evidence to support the finding that they did violate the terms of the temporary injunction, and we have held that upon petition for certiorari, the court does not review questions of fact but only questions of law. * * *"

It is submitted that the evidence which the lower courts seized upon to uphold the conviction for contempt was woefully inadequate for its purpose. Conviction for contempt on a record totally devoid of any evidence that petitioners had passed out the previously enjoined handbills deprived the petitioners of their liberty without due process of law.

B. There was no evidence tending to prove that petitioners had violated the injunction as it related to Section 14-53 of the Fairfield City Code.

Similarly, there is no evidence in the record that the appellants violated the order enjoining them from holding a public meeting on Wednesday, October 11, 1961. As Officer Misso testified, "There was no meeting held" (R. 24). This was not surprising, of course, since as Misso went on to explain, "The building was padlocked and * * * my orders were to keep everybody out" (R. 34). Thus, as appellant Fields testified, he "was refused entrance to the hall" and "no one could cross the street to the hall" (R. 50).

To be sure, as Chief Morris affirmed, "a crowd had congregated across the street from * * * the proposed meeting

place" (R. 27), and there is no denial of the fact that Fields as well as other people from the National States Rights Party were also in the vicinity across the street from the hall. Their presence there, however, was for the sole purpose of telling "the people that might come there that there wasn't going to be a meeting" (R. 63) and to direct "anyone who responded to the handbill before the injunction was issued to go to the Lipscomb City Park" (R. 49). As Police Officer Pope testified, appellant Fields was not attempting to hold any kind of meeting at the hall but rather "was telling them that the meeting had been called off over there and would be at * * * Lipscomb City Hall" (R. 19).

In the face of these facts, the City could hardly have claimed that the meeting had been held. Instead, counsel argued that Fields had "just as effectively had a meeting as if the injunction had not been issued because he went out there and he talked to all these people up and down" (R. 65-66). Even the lower court, however, could not bring itself to accept this. It made no mention of the public meeting, but instead chose to hold the appellants in contempt on the grounds of distributing *The Thunderbolt* (see R. 72). Similarly, the Supreme Court of Alabama avoided discussing the evidence as to the meeting by relying on its general statement that "there is evidence to support the finding that they did violate the terms of the temporary injunction * * *" (R. 88).

CONCLUSION

For the reasons stated above, appellants' convictions must be reversed and the charges against them dismissed.

Respectfully submitted,

MELVIN L. WULF,
156 Fifth Avenue,
New York 10, N. Y.,

CHARLES MORGAN, JR.,
Bank for Savings Building,
Birmingham, Alabama,

LEON FRIEDMAN,
RICHARD J. MEDALIE,
425 Park Avenue,
New York, N. Y.,

Attorneys for Appellants.

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